United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-6011

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-6011

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P/S

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

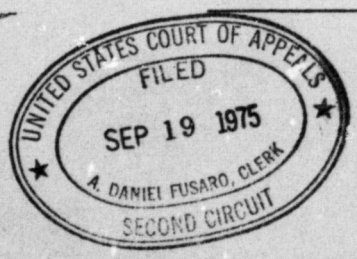
v.

HEALTHCO, INC.,

Defendant-Appellee.

ON CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE UNITED STATES OF AMERICA



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REPLY BRIEF FOR THE UNITED STATES OF AMERICA

I. Introduction

The Brief for Healthco, Inc. tends to ignore and obscure the basic functions which market definitions and market share compilations are designed to serve. Section 7 of the Clayton Act is based upon the assumption that market structures which enable a few firms to exercise a considerable measure of control over prices, supplies, product developments, etc. have an adverse effect upon economic performance. Congress accordingly enacted Section 7 to stop "a trend toward concentration in its incipiency before that trend developed to the point that a market was left in the grip of a few big companies." United States v. Von's Grocery Co., 384 U.S. 270, 277 (1966).

A merger contributes to such a concentration trend if it enhances the "market power" of some firm within some market. The Supreme Court has concluded that "[s]tatistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; . . ." Brown Shoe Co. v. United States, 370 U.S. 294, 322 n. 38 (1962). As we noted in our opening brief, such statistics may alone be sufficient to establish the illegality of many horizontal mergers without an examination of market behavior and probable anticompetitive effects. United States v. Philadelphia National Bank, 374 U.S. 321, 363 (1963); see also, United States v. Continental Can Co., 378 U.S. 441; 458 (1964); United States v. Von's Grocery Co., supra; United States v. Pabst Brewing Co., 384 U.S. 546 (1966).

This does not mean that statistics measuring combined market shares and concentration level increases at or about the time of merger will always be conclusive. In some circumstances a horizontal combination may have a greater or lesser impact upon competition than such statistics would indicate. In Philadelphia National Bank, the Court said that a merger which produces an "undue" combined market share and a "significant" increase in the concentration level "must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." 374 U.S. at 363. The Supreme Court found that such evidence existed in United States v. General Dynamics Corp., 415 U.S. 486 (1974). The Court said that "the statistical showing proffered by the Government in this case, . . . would . . . have sufficed to support a finding of 'undue concentration' in the absence of

other considerations, "but the district court correctly concluded "that other pertinent factors affecting the coal industry and the business of the appellees mandated a conclusion that no substantial lessening of competition occurred or was threatened . . ." Id. at 497-498.

This does not mean that the government is required to negate the possible existence of "other factors". The government can establish a prima facie case on the basis of statistical evidence. If it does so, then it is "incumbent upon . . . [the defendant] to show that the market share statistics gave an inaccurate account of the acquisitions' probable effects on competition." U.S. v. Citizens & Southern National Bank, ___ U.S. ___, 43 U.S.L.W. 4779, 4789 (June 17, 1975). 1/

These past decisions of the Supreme Court provide a method of analysis which should be followed in all horizontal merger cases arising under Section 7 of the Clayton Act. One should first ascertain the combined market share of the merging companies and the combined share of the industry leaders. 2/ In order to accomplish this, it is necessary to identify the product and geographic dimensions of one or more markets because such statistics cannot be developed without defining a market. Once the market has been determined, it is then necessary to identify the sellers in the market and to obtain data with respect to the sales of each seller

1/ Mr. Justice Stewart wrote the majority opinion for the Court in both the General Dynamics and the Citizens and Southern Cases.

2/ The level of concentration is normally measured in terms of the share of the market accounted for by the top four, top eight, top ten, etc.

during some period at or about the time of acquisition. Such data is necessary to identify the market leaders and to obtain a total sales figure which can be used to compute market shares. Once these computations have been made the statistics with respect to the combined share of the merging companies and the concentration levels can be compared with statistics in prior merger cases to determine whether the combination is presumptively unlawful. If it is, then the defendant must demonstrate the presence of "other factors" to avoid a judgment under Section 7.

As noted in our opening brief, the government did identify three different relevant markets and presented statistical evidence establishing a prima facie illegality in each of those markets. The Healthco brief disputes the validity of the market determinations, asserts that the statistics are inaccurate, and claims that "other factors" are present in this case which could overcome a prima facie statistical case. None of those contentions are well founded.

II. The Relevant Markets

The government contended and the district court found that dental products is a relevant line of commerce or product market, that dental equipment and dental sundries are relevant submarkets, and that Metropolitan New York is a relevant section of the country or geographic market. Healthco's brief disputes both the product and geographic dimensions of the markets which the district court found.

A. Geographic Market.

Metropolitan New York was defined for purposes of this case to include all of New York City plus Nassau, Suffolk, Rockland and Westchester Counties in New York and Bergen, Essex, Hudson, Middlesex, Morris, Passaic, Somerset and Union Counties in New Jersey. Healthco apparently contends that this area should have been divided by designating Rockland and Westchester Counties as a separate market and that such a market definition would have revealed that Hebard-Dental served a different market from all the other acquired companies (Br. 12, 37-39).

The record does not support that claim. The stipulated data with respect to county-by-county sales by companies which Healthco acquired demonstrate that companies which Healthco acquired prior to the acquisition of the Hebard companies sold over $220,000 worth of dental products in Westchester and Rockland counties in 1968 (J.A. 2e-4e). Moreover, all of the companies had more than de minimus sales in the Bronx. Hebard-Dental sold about $29,000 worth of dental products in the Bronx in 1968, Hebard-Metro sold about $49,000, and the other companies which Healthco acquired sold over $350,000. In these circumstances, the Hebard Dental acquisition could not be viewed as a market extension merger and no useful purpose would be served by performing a separate horizontal merger analysis for different submarkets within the Metropolitan New York area. 3/

3/ Healthco claims that the dental equipment market might show a different distribution pattern from that of dental products as a whole and that the government did not negate the possibility that the $220,000 plus sales by other Healthco companies did not include

[Continued]

In addition, Healthco's argument ignores the fact that Hebard Dental was simply an affiliate of Hebard-Metro (J.A. 5e). Marvin Cyker, Healthco's president, testified that these companies had common ownership and were "like one company, more or less" (J.A. 505a-507a). Thus, they had common names and were purchased simultaneously by Healthco (J.A 507a). Hebard-Metro, which is located on Long Island, made substantial sales in counties in which Healthco also made sales prior to its acquisition by Healthco. If these companies, as suggested by Healthco's president, are treated "like one company" (J.A. 505a), Healthco was making substantial sales in all counties in which Hebard was making substantial sales prior to the merger. Therefore, under any economic or legal analysis, Healthco and Hebard were actual competitors, not potential competitors, in all counties in Metropolitan New York.

Healthco argues that Metropolitan New York is not a broad enough market because some purchasers, such as dental laboratories, purchase supplies from sellers who do sell in a much broader area. A similar argument was rejected in Philadelphia National Bank. 374 U.S. at 357-362. Most purchasers buy their dental products from local dealers and the combining companies made the bulk of

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any equipment. Such a possibility is extremely remote. Salesmen for full-line dental dealers solicit sales for all types of dental products including dental equipment. (J.A. 210e). Since Healthco salesmen were active in Westchester and Rockland Counties, Healthco necessarily competed with Hebard Dental for sales of equipment and other dental products.

their sales in the New York Metropolitan area. Therefore, this area of "effective competition" is a relevant market for purposes of this case. 3a/

B. Product Markets-Customer Classifications

Healthco also contends (Br. 23-32) that the district court should have selected different product markets. Healthco is apparently suggesting that the market should have been divided according to classes of customers in order to differentiate sales to new dentists, old dentists, dental laboratories, etc. Such submarkets may exist and conceivably might be relevant for purposes of some merger. However, we believe that markets which include sales to all classes of customers are relevant markets for purposes of analyzing the effects of this combination of dental dealers. The companies which Healthco acquired sold their products to all classes of customers. Therefore, the customer markets suggested

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3a/ There may be more than one relevant section of the country in a Section 7 case. United States v. Pabst Brewing Co., 384 U.S. 546 (1966); United States v. Marine Bancorporation, 418 U.S. 602, 621, n. 20 (1974).

by Healthco would be of little utility in analyzing the effects of these acquisitions and probably would not qualify as relevant markets.

It should, of course, be noted that more than one geographic or product market may be a relevant market for purposes of a particular Section 7 case. Therefore, Healthco could not demonstrate the invalidity of the district court's market determinations by showing that some other market is relevant. It would have to demonstrate that the district courts' markets are irrelevant.

Healthco's product market theory should not be considered in any event because it is based primarily upon the Kalik Affidavits (J.A. 856a-865a). The information contained in these obviously self-serving affidavits was never offered by Healthco at trial and accordingly has never been subjected to cross-examination and rebuttal testimony by the government. Rather, these affidavits were offered by Healthco at a hearing on relief (J.A. 870a-972a) after the district court had already made its findings of fact and conclusions of law. Government counsel were not aware of the existence of these affidavits until that hearing and were not given an opportunity to investigate the information contained therein in order to determine its accuracy. 4/ In any event, the district court properly ignored them (J.A. 876a).

4/ The government has subsequently examined the information contained in these affidavits and is prepared to demonstrate that most of this information is either inaccurate or misleading.

Much of the information contained in the Kalik affidavits concerns events which took place several years after the acquisitions in question. Such post acquisition information, even if it had been offered as evidence at trial, has "extremely limited" probative value. United States v. General Dynamics Corp., supra, 415 U.S. at 504 (1974). Moreover, Healthco has cited no evidence offered at trial which supports the statements contained in the Kalik affidavits. Yet, it relies upon these affidavits to establish facts not in the trial court record. 5/ Healthco was given an opportunity to present evidence at the trial. It cannot be permitted to cure the deficiencies of its own proof by means of information which it never presented at trial.

C. Product Market - Seller Classifications.

Healthco not only contends that the district court erred in failing to differentiate among classes of purchasers, but also contends that the district court erred because it did differentiate among classes of sellers. The district court defined the markets in terms of sales of dental products, dental sundries and dental equipment by dental dealers. Healthco claims that the market should have been expanded to include direct sales by manufacturers.

Again it should be noted that Healthco cannot demonstrate error by establishing that a market exists which encompasses dealer sales and manufacturer sales. Healthco must demonstrate that a market which is limited to dealer sales is not a relevant market for purposes of this case. Healthco has not done so.

5/ See Healthco Brief, pp. 14, 17, 24-26. Healthco, without citing any testimony offered at trial, speculates concerning the buying habits of dentists and the availability of alternative sources of supply.

We believe manufacturers' sales were properly exluded from the market for purposes of assessing the competitive effects of mergers among dental dealers. Many of the manufacturers surveyed by the government indicated that they specialized in certain types of products (see, e.g., J.A. 66e, 72e, 111e, 113e, 125e), or sold primarily to certain specialized classes of customers such as dental labs (see, e.g., J.A. 64e, 71e, 72e, 75e, 76e, 96e, 104e, 106e, 111e, 141e, 143e). Only 25% of the manufacturers surveyed by the government indicated that they sold dental equipment. Such limited sales of specialized products to specialized customers have little impact upon competition among dental dealers. Of greater importance in the fact that manufacturers generally do not sell direct to dentists, the largest class of purchasers of dental products. Dentists do not purchase in sufficient volume to attract direct manufacturer selling interest. Consequently, the exclusion of direct sales by manufacturers is necessary in order to accurately describe the structure of the selling market relevant to the largest class of purchasers of dental products.

Courts have adopted similar product market definitions in other cases. For example, in Philadelphia National Bank the Supreme Court concluded that the cluster of products and services denoted by the term "commercial banking" constitutes a distinct market for Section 7 purposes even though other financial institutions (savings banks, trust companies, etc.) offer some of the services offered by banks. 374 U.S. at 356-357. Manufacturers who make direct sales of particular products or groups of products are not selling a cluster of products which is comparable to the broad line of products

sold by the full-line dental dealers which Healthco acquired. 6/

In United States v. Kimberly-Clark Corporation, 264 F.Supp. 439 (N.D. Calif. 1967), the court defined the relevant product market to include printing and fine papers, and coarse papers and paper products sold by "paper merchants." Similarly, in Avnet, Inc. v. Federal Trade Commission, 511 F.2d 70 (7th Cir. 1975), petition for cert. filed, 43 U.S.L.W. 3645 (U.S. May 29, 1975), the court affirmed a decision by the Federal Trade Commission holding that Avnet's acquisition of two competing manufacturers of parts which were sold to rebuilders of automotive electrical units violated Section 7 of the Clayton Act. The Commission found that the relevant line of commerce was direct sales of new parts, materials, and equipment by rebuilder suppliers to production-line rebuilders. The court of appeals sustained this market definition against Avnet's claim that sales to custom rebuilders as well as sales to production-line rebuilders should have been included in this market. Thus, the district court's definition of the relevant product market is consistent with prior case law.

Moreover, even if the district court had erred in excluding manufacturer sales, the inclusion of those sales would not result in a material change in the market share statistics. Contrary to Healthco's assertion (Br. 31-32), the record in this case does contain sufficient information to enable a court to compute the approximate shares of the combining companies and the industry

6/ In United States v. Connecticut National Bank, 418 U.S. 656 (1974), a bank merger case, the Court reversed a district court ruling that the appropriate line of commerce included both commercial banks and savings banks. The Court held that the difference in what commerical banks can offer to one particular class of customers was "sufficient to establish commercial banking as a distinct line of commerce." Id. at 664.

leaders in markets which are defined to include dealers and manufacturers' sales. GX 45 (J.A. 165e-170e) summarizes the data with respect to dental product sales by manufacturers to customers in the New York Metropolitan area in 1968, 1969, and 1970. 7/ Statistics for the dental products market can be readily computed by adding those sales to the total sales shown in other government exhibits and calculating combined market shares for the merging companies and the industry leaders as a percentage of that total.

GX 45 does not provide a complete breakdown of sales by category. Accordingly, it is not possible to make as precise a calculation with respect to the equipment and sundries submarkets. However, GX 45 and GX 44 do identify manufacturers who do not sell any equipment or any sundries. Therefore, it is possible to compute a sales universe concentration ratios and market shares for Healthco by making the arbitrary assumption that all sales by manufacturers who sold some equipment should be added to total equipment sales and all sales by manufacturers who sold some sundries should be added to the sundries total. This method artificially inflates the total market or sales universe figures for dental equipment and sundries thereby understating the actual combined market shares for Healthco and other individual firms. Despite such understatement of Healthco's market shares, its acquisitions would still result in combined market shares exceeding those which the Supreme Court has found to constitute a prima facie violation of Section.

If the 1968 statistics are computed according to the methods described above the results are as follows:

7/ Some of the information from GX 45 is reproduced at page 16 of the Healthco brief.

	Products	Sundries	Equipment
Healthco 8/	25.6%	20.2%	29.6%
Top 4 9/	26.0%	23.6%	30.6%
Top 8	44.3%	39.3%	50.4%
Top 10	50.9%	45.2%	57.6%

If these results are compared to the statistics which the Supreme Court said would have sufficed in General Dynamics in the absence of other factors, this combination is presumptively unlawful. In General Dynamics, the combining companies ranked second in the "Province" coal market with a 12.4% combined market share. 415 U.S. at 496. The Supreme Court described the concentration level in General Dynamics as being comparable to that in Von's Grocery in which the top four firms controlled 24.4% of the sales and the top eight had 40.9%. 384 U.S. at 281.

8/ Represents combined share of all companies which were eventually acquired by Healthco.

9/ Top 4, Top 8, and Top 10 figures represent pre-merger concentration level. Companies acquired by Healthco are not aggregated for this purpose.

The General Dynamics opinion also noted that the combination produced a significant increase in the level of concentration as measured by sales attributable to the top two firms. The 1959 Province market shares of the top two companies would have been 33.1% but for the merger and 37.9% given the merger. In this case the 1968 top two share in dealer plus manufacturer sales markets would have increased as follows:

	But for Merger	Given Merger
Products	14.3%	32.8%
Equipment	18.4%	37.0%
Sundries	13.8%	28.0%

Thus, Healthco has not demonstrated any defect in the district court's market determinations which warrant the conclusion that the government did not establish a prima facie case under Section 7. 10/

10/ It should be noted that this Court may adjust market share findings on appeal if it chooses to do so. The Supreme Court adjusted market share computations in Philadelphia National Bank (374 U.S. at 364, n. 40) and directed the entry of judgment for the government on the basis of its own computations.

III. The Market Share Statistics

Healthco has also asserted that the government's statistics do not accurately reflect the market shares of the combining companies or the industry leaders (Br. 42-55). Healthco apparently does not question the accuracy of the sales data for those companies, but insists that the total sales of products, sundries, and equipment are greater than the totals shown in government exhibits and, therefore, the combined market share figures are overstated.

As we noted in the preceding section, the share data in this case substantially exceeds the minimum combined shares and concentration levels which would be sufficient to establish presumptive illegality under the Section 7 standards for horizontal mergers. Therefore, Healthco would be required to demonstrate statistical errors of very substantial magnitude in order to justify a conclusion that these acquisitions are not presumptively unlawful. It could not do so by demonstrating that a few marginal sellers have been omitted or that a few of Healthco's competitors supplied erroneous sales data.

The Supreme Court observed in Brown Shoe Co. v. United States, supra, 370 U.S. at 342:

> In summary, although appellant may point to technical flaws in the compilation of these statistics, we recognize that in cases of this type precision in detail is less important than the accuracy of the broad picture presented. We believe the picture as presented by the Government in this case is adequate for making the determination required by §7: whether this merger may tend to lessen competition substantially in the relevant markets. (emphasis in original).

A. The Government's Methodology

The methodology which the government used in this case is more than adequate to present the broad picture accurately. The government contacted every dental dealer, mail order house and manufacturer which it had reason to believe was selling dental products in Metropolitan New York. The names of the companies contacted were compiled from trade association manuals, interviews with dental dealers (J.A. 294a-295a) and from Healthco's answers to interrogatories submitted by the government (J.A. 784a-788a, 800a, 807a-809a). Any company which Healthco identified as a competitor including mail order houses located outside of the market were contacted by the government (J.A. 20e, 25e, GX 29). The data gathered by these surveys is fully reported in the government's statistical exhibits (GX 31; J.A. 28e-179e).

The terminology used in the government's survey forms is completely consistent with the terminology used in the dental products industry (GX 4) and by the Census Bureau (J.A. 18e, 290e, 313e, 317e, 318e, 389e) to collect business data in this industry. Moreover, the market definitions (dental products, dental equipment and dental sundries) were consistent with those commonly used in the industry (J.A. 30a-33a, 142a-143a).

Healthco contends that the government's methodology is deficient because it failed to comply with the methods approved in the Manual for Complex Litigation, 1 Pt. 2 Moore's Federal Practice (1975), for polls and samples. However, the United States did not conduct a "poll" or a "sample" as those terms are defined in the Manual. A "poll" and a "sample" are simply means by

which the characteristics of a larger group (or universe in statistical terms) are determined by sampling or polling a small portion of that group. 11/ Id. at ¶ 2.712, p. 94. In this case, the government did not contact a small group of dental products sellers in order to determine the characteristics of all sellers of dental products. Rather, the government contacted every seller of dental products in Metropolitan New York. 12/

The methodology employed by the government in this case is comparable to the methodology approved in other antitrust cases. E.g., United States v. National Homes Corporation, 196 F. Supp. 370 (N.D. Ind. 1961). In United States v. Blue Bell, Inc., 1975 CCH Trade Cases ¶ 60, 270 (M.D. Tenn. Feb. 19, 1975), the court admitted into evidence market data gathered by means of a survey which employed methodology essentially identical to the survey in this case. The court noted that even if the survey had some minor defects, it is still admissible.

11/ A common example are public opinion polls such as the Gallup Poll or Harris Poll which attempt to measure the President's popularity in the nation by interviewing approximately one thousand people.

12/ Similarly, the cases primarily relied upon by Healthco (see, e.g., State Wholesale Grocers v. Great Atlantic & P. Tea Co., 154 F. Supp. 471 (N.D. Ill. 1957), rev'd in part, 258 F.2d 831 (7th Cir. 1958), certiorari denied, 358 U.S. 947 (1958); American Luggage Works, Inc. v. United States Trunk Co., Inc., 159 F. Supp. 50 (D. Mass. 1957), aff'd sub nom Hawley Products Co. v. United States Trunk Co., Inc., 259 F.2d 69 (1st Cir. 1958)) involved polls or samples by which a party attempted to prove the characteristics of a larger group by establishing the characteristics of an allegedly representative smaller group.

In contrast to the methodology employed by the government, most of Healthco's statistical evidence is based upon polls or samples (DXU; J.A. 381e). Thus, based on Healthco's own arguments, this evidence should have been ruled inadmissable by the district court.

The methodology employed by the government virtually guaranteed that all competitors in the relevant market were included in the survey. If any company was overlooked by the government, then that company was never listed by Healthco as a competitor,12a/ never listed by any other dental dealer in the area as a competitor and does not belong to any trade association. If any such company exists, it obviously cannot be a significant factor in the Metropolitan New York market.

B. Healthco's Methodology

Healthco argues that its data confirms that the government's statistics underestimated the size of the market (Br. 46-55). However, as found by the district court, the record supports the conclusion that Healthco's statistical data is inaccurate and speculative (J.A. 814a-816a).

1. Healthco contends that census data reported in Defendant's Exhibit A (J.A. 313e) proves that there are 118 establishments selling dental products in Metropolitan New York in 1967 as opposed to the 64 listed by the government. However, as explained in Government's Exhibit 49 (J.A. 280e) the term establishment as used by the Census Bureau means "a single physical location at which business is conducted" (id.). Thus, for purposes of a census report, a single dental dealer with two outlets would be reported by the Census Bureau as two establishments rather than

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12a/ Healthco was given repeated opportunities to list additional companies which the government should contact. The government contacted at its own expense every company suggested to it by Healthco.

as a single competitor. 13/ Obviously, for purposes of Section 7, the important fact is how many competitors there are in the market, not how many separate establishments there are. 14/ The government's survey did include all significant competitors in the market.

Moreover, the census data relied upon by Healthco refers to sales by Merchant-Wholesalers. The term Merchant-Wholesaler includes a number of business entities such as importers and exporters which make no direct sales to consumers in Metropolitan New York (J.A. 722a, 728a-729a). However, their sales to each other and to dental dealers and supply houses are included in the Census Bureau statistics making this data useless for measuring the market in this case.

2. Healthco also relies upon the testimony of David Ellis to support its contention that the government underestimated the size of the market (H. Br. 49). However, Ellis played no part in gathering the raw data he used to make his estimates (J.A. 548a). Thus, there is no way to determine on the basis of this record whether this data is accurate. Moreover, this data did not specifically relate to Metropolitan New York. 15/ Thus, the decision of the district court to attach no weight to this testimony is not clearly erroneous.

13/ This is confirmed by John Wikoff, a Census Bureau official, who testified as a rebuttal witness (J.A. 707a).

14/ Healthco's own expert, David Ellis, conceded that he could not draw the inference that 118 establishments means 118 competitors (J.A. 542a).

15/ Ellis' testimony is based upon the 1968 ADA Survey of Dental Practice (DX U). Three out of four dentists in the sample failed to respond to the questionaire. The terminology used in it does not conform to the definitions used in this case.

3. Dr. Gould, Healthco's other expert witness, relied upon input-output analysis in order to demonstrate that the government underestimated the size of the market. Dr. Gould arrived at his estimate of the market by means of a series of highly questionable calculations based upon the data contained in the Census of Manufacturers. The inherent deficiencies in this method of analysis are fully discussed in the testimony of Dr. Schwartzman, the government's expert economist (J.A. 747a-756a). It is obvious from Dr. Schwartzman's testimony that Dr. Gould misinterpreted census data which in any event could not be used to measure the market at issue in this case. 16/ Contrary to the statement in Healthco's brief (H. Br. p. 51), Dr. Schwartzman's testimony proves that Dr. Gould's analysis is incorrect and that his ultimate conclusion is erroneous. Thus, the district court's rejection of Dr. Gould's testimony was not clearly erroneous.

16/ One of the more blatant examples of Dr. Gould's questionable calculations is his conclusion that dentists' purchases of X-ray apparatus and tubes accounted for $45 million of manufacturers' shipments. This calculation is based upon the assumption that the dollar expenditures for purchases of "X-ray Apparatus and Tubes" by dentists and doctors are in direct proportion to their incidence in the population. This assumes that an X-ray machine used by a dentist costs exactly the same as one used by a doctor and that medical and dental practice involve an equal consumption of X-ray supplies at identical costs. Moreover, Dr. Gould applied the same formula to "Medical diagnostic and theapeutic electronic equipment" such as diathermy equipment, electrocardiagraphs and electroencephalographs used by doctors but not by dentists and to industrial and scientific X-ray equipment presumably used by neither dentists nor doctors (J.A. 750a-757a).

4. Healthco claims that the results of a survey taken by Proofs Magazine of a small sample of dentists in order to determine their sources of supply proves that the government underestimated the market. 17/ The deficiencies of this survey are clearly revealed in the deposition of Joseph Wolking (J.A. 345e-379e). Wolking, who has no background or training as a statistician, 18/ conceded that some of his questions were ambiguous (J.A. 367e-370e) and that due to the nature of his survey, there was no way to check his responses to see if they represented a cross-section of the group surveyed (J.A. 373e). Moreover, he also conceded that the purpose of the survey was not to determine the total amount of supplies purchased by dentists (J.A. 374e). 19/

5. Healthco also lists the names of various companies which it contends were not included in the government's survey evidence but which actually do make sales in Metropolitan New York (H. Br. 7-8). These companies, Healthco concedes, are almost all mail order houses (id.). Since mail order houses do not sell equipment,

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17/ The study indicates that 3,970 dentists were sent copies of the questionnaire (J.A. 381e). There is no evidence in the record which establishes that those contacted were a representative sample of all dentists. In any event, only 20% of the 3,970 dentists contacted responded to the questionnaire (J.A. 381e). There is no evidence in the record which establishes that any of the responses that were included in the survey came from Metropolitan New York.

18/ Wolking was unable to calculate the standard error which might result from the survey he conducted or state the formula for computing it (J.A. 366e-367e).

19/ Actually, if this study proves anything, it proves that manufacturers make almost no direct sales (J.A. 382e).

this alleged omission is immaterial in the equipment submarket. 20/ Moreover, Healthco presented no evidence that any of these companies made sales in Metropolitan New York at the time the acquisitions were made. The fact that they may exist somewhere has little relevance. Finally, Healthco did not list these companies as competitors prior to trial so that the government could have contacted them to determine if they did indeed make sales in Metropolitan New York. The government contacted those mail order houses which Healthco listed in its responses to the government's interrogatories but these companies were competitively insignificant (J.A. 811a-812a).

Thus, Healthco has not demonstrated any error in market determination or the computation of market shares. This Court should accordingly conclude that these statistics do "suffice" to establish Section 7 violations in the absence of clear proof of affirmative defenses which could overcome the government's prima facie case.

IV. Affirmative Defenses

Healthco has not demonstrated the existence of any such affirmative defenses in this case. The Healthco brief does advance two contentions which may represent a belated attempt to establish the existence of such affirmative defense. Healthco asserts that some of the acquired companies were marginally profitable

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20/ Significantly, Healthco has not disputed in its brief the government's contention that mail order houses do not sell equipment and confine their sales activities primarily to rural areas (Gov. Br. 22-23, 35). In fact, Ernest Sandler, the president of a Long Island mail order house, who testified as a defense witness, conceded that he did not sell equipment (J.A. 638a) and that between 85% - 90% of his sales are made outside of Metropolitan New York even though his business is located in that market (J.A. 701a).

and that new distribut[illegible]ethods are altering the nature of competition in the sale [illegible]ental products to ultimate consumers (Br. 32-36).

Marginal profitability is not an acceptable defense in a Section 7 case. A defendant must satisfy all of the requirements of the failing company doctrine in order to justify an acquisition on the basis of the acquired company's unpromising financial prospects. See, e.g., International Shoe Co. v. FTC, 280 U.S. 291 (1930); Citizen Publishing Co. v. United States, 394 U.S. 131 (1969); United States v. Greater Buffalo Press, 402 U.S. 549 (1971). However, Healthco has never argued that any of the acquired companies is a "failing company."

The fact that one or more of the acquired companies may have experienced financial problems prior to its acquisition by Healthco is irrelevant to the issue of whether Healthco's acquisitions violated Section 7. United States v. Jos. Schlitz Brewing Company, 253 F. Supp. 129, 148 (N.D. Calif. 1966), aff'd 385 U.S. 37 (1966); United States v. Phillips Petroleum Company, 367 F. Supp. 1226 (C.D. Calif. 1973), aff'd 418 U.S. 906 (1974). In Phillips Petroleum, Phillips presented evidence establishing that the market share of the acquired company had been declining (id. at 1230-1231) and that its president intended to cease business operations. Thus, the acquired company argued "that since it would have gone out of business . . . anyway, the acquisition of its assets by Phillips did not result in any anticompetitive effect in the market . . ." Id. at 1258. The district court rejected this argument stating (id. at 1258-1259):

> This contention must fail because the reason for, or the circumstances leading to, an acquisition are irrelevant in determining whether § 7 has been violated. Section 7 is concerned only with the effect upon competition of an acquisition, and the statutory language was carefully drafted to refer only to an acquisition's effect. If the acquisition has a substantial anticompetitive effect, it is illegal under § 7. With reference to the antitrust laws, unless the seller objectively comes within the "failing company" doctrine, it is irrelevant why one corporation sells its assets to another. The issue in an antitrust case is not a determination of the reasons for selling, but only the anti-competitive effect of the sale.

As noted by the district court (J.A. 825a-826a), the particular affirmative defense recognized in United States v. General Dynamics Corp., supra, has no application to the facts of this case. General Dynamics "arose in unusual market contexts and involved peculiar fact patterns not likely to recur in future section 7 litigation." Robinson, Recent Antitrust Developments: 1974, 75 Columbia L. Rev. 243, 244 (1975). That case involved the acquisition of a strip-mining coal producer. The district court found that the acquired company did not have the capacity to engage in deep mining, had committed most of its strip coal reserves under long-term contracts, and could not acquire economically mineable strip coal reserves in the geographic areas which the government had designated as relevant geographic markets. The Supreme Court concluded on the basis of those facts that the acquired company could not have been a significant factor in the market after the acquisition if it had remained independent and accordingly the market share statistics based upon production at the time of acquisition and the time of suit did not provide reliable indicia of the effect of the acquisition upon the market power of the acquiring company.

The acquired companies in this case did not face any comparable problems. They were engaged in an essentially retail business and necessarily have a continuing source of supply. Accordingly, one can assume that the sales volume at or about the time of acquisition is indicative of the company's future competitive potential.

Healthco's reliance upon changing distribution patterns is misplaced because there is no factual predicate in this record for a conclusion that these markets are so volatile that time of acquisition market statistics do not provide reliable indicia of the future effects of the merger. Healthco never presented any evidence at trial which contradicts the district court's finding that "[t]here has been no significant entry, since 1968, into the full line dealer or non-full line dealer. This has its greatest effect in the equipment submarket" (J.A. 822a).

V. Relief

Since the government established a prima facie case in all three markets and Healthco failed to demonstrate any "other factors" which would rebut that case, the government was entitled to relief which would effectively restore competition in all three markets. However, even if one assumes that the violation was confined to the equipment market, the government was entitled to a decree which will effectively restore the competition foreclosed by the acquisitions in that market. As our opening brief notes, the district court failed to grant such relief.

While there is no doubt that a district court has some degree of discretion in framing relief in a Section 7 case, the judgment which is entered must "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance." Ford Motor Co. v. United States, 405 U.S. 562, 573 n. 8 (1972) (emphasis in original). Moreover, the Supreme Court has emphasized that "once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." United States v. DuPont & Co., 366 U.S. 316, 334 (1961). There can be little doubt that the district judge in this case failed to resolve "all doubts as to the remedy" in favor of the government and that the judgment entered will not restore competition to this market.

The judgment entered by the district court does not "cure the ill effects" (United States v. United States Gypsum Co., 340 U.S. 76, 88 (1950)) of Healthco's illegal acquisitions because it permits Healthco to retain almost all of the physical assets, including equipment inventories, which it acquired. The building which is to be transferred to the new equipment company was never owned or used by any of the acquired companies prior to their purchase by Healthco. Thus, the judgment, which Healthco itself drafted, permits Healthco to keep the physical assets associated with the equipment operations of all of the companies it illegally acquired and orders it to surrender assets not at issue in this case. 22/ Moreover, the judgment does not provide the new company adequate protection from Healthco and does not contain the standard procedural safeguards routinely placed in all Section 7 judgments (Gov. Br. 30-32). 23/

In addition, the judgment entered by the district court does not restore competition to the equipment submarket and

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22/ As previously noted (Gov. Br. 13), the government did not see a copy of Healthco's proposed judgment until after the start of the April 3, 1975 hearing (J.A. 870a-895a). Thus, the government was unaware of the provisions in this judgment until its attorneys read Healthco's proposal in the courtroom during the brief hearing at which the district judge signed this judgment. Under these circumstances, the government, without being able to investigate the provisions in Healthco's proposal, was hardly in a postiion to offer evidence opposing a judgment it had never seen. Moreover, since the district court had failed to reach the question of whether Healthco had violated Section 7 in the dental products markets, a finding which would have required complete divestiture of all acquired assets, government counsel did not believe that the district court would prejudice the public by granting the government less relief than it would have received had the court reached this issue and resolved it in the government's favor.

23/ Healthco's statement that the judgment it drafted "eliminates Healthco from the dental equipment industry in the entire New York metropolitan area" (H. Br. 63) is totally false. Under Healthco's judgment, it is simply prohibited from soliciting, as opposed to making, equipment sales involving some but not all brands of equipment

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leaves that submarket more concentrated than it was prior to Healthco's illegal acquisitions. Healthco acquired four of the top ten companies in the equipment submarket (J.A. 50e). However, rather than restoring the four competitors in this submarket that had been eliminated by Healthco's illegal acquisitions, the judgment entered by the district court creates one equipment company. Each of these companies had been a full line dealer prior to its acquisition by Healthco.

Finally, the judgment establishes an unviable corporation which will not be able to successfully compete with Healthco and other established dental dealers. The importance of sundries sales and sundries salesmen to the financial viability of a dental dealer has already been discussed. (Gov. Br. 29-30). Equipment and sundries have a symbiotic relationship. Sundries salesmen solicit equipment sales as well as make sundries sales (J.A. 207e-210e). The equipment specialists such as those who will be transferred to the new corporation pursuant to the judgment entered by the district court (J.A. 899a) demonstrate equipment on a display floor and have fewer contacts with dentists (J.A. 211e-212e). Thus, without the revenue derived from sundries sales and without the equipment sales generated by sundries salesmen, there is little likelihood that this new company will be able to survive.

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from some but not all dentists in Metropolitan New York (J.A. 899a-900a). Healthco sundries salesmen already sell equipment as part of their regular duties (J.A. 210e). Moreover, Healthco retains all of the equipment facilities including inventories and the service and repair shops of all acquired companies.

Healthco argues that the new corporation may be able to obtain sundries lines from sundries manufacturers. (H. Br. 61). However, manufacturers' lines of all types of dental products are not easily obtainable by a new entrant (J.A. 88a, 166a-167a, 195a-196a). Moreover, it may take months or even years to obtain the sundries lines now commonly carried by other dental dealers from the sundries manufacturers. During this period, the new company may go bankrupt from lack of sundries' revenues and from lack of equipment sales solicited by sundries salesmen. Thus, given the strong possibility that the new equipment company created by the district court's judgment will not be able to survive in this market, the judgment entered by the district court is inadequate to restore competition to the market and does not satisfy the requirements of Ford Motor Company.

The cases cited by Healthco (Br. 57-60) in support of "partial divestiture" are not applicable to this case. They certainly do not support the proposition that a company which acquires three or four competing entities may be permitted to divest a single entity. At most they demonstrate that divestiture of a portion of the acquired or acquiring company's business may be permissible if the combining companies did not previously compete in all markets in which each company participated. However, every divestiture decree, complete or partial, must endeavor to establish a new entity which is likely to be a viable competitor and accordingly must provide the divested entity with sufficient assets to accomplish that result. None of the consent decrees or litigated decrees in cases cited by Healthco sanction any deviation from that rule.

CONCLUSION

For the reasons given in our opening brief and this Reply Brief, the decision of the district court should be reversed insofar as it fails to adjudge that Healthco violated Section 7 of the Clayton Act in the dental products and dental sundries markets. The decree should be vacated and the case should be remanded with directions to enter a new judgment providing for the divestiture of four full-line dental dealers with sufficient assets to provide effective competition in the New York Metropolitan area.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I, John J. Powers, III, hereby certify that I have on this 17th day of September, 1975, served by mail a copy of the Reply Brief For The United States of America upon the following persons:

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